IN THE

Supreme Court of the United States

October Term, 1963

Docket No. 91

JOHN WILEY & SONS, INC.,
Petitioner,

against

DAVID LIVINGSTON, as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Opinions Below

The opinions of the Court of Appeals (R. 88) are reported at 313 F. 2d 52 and the opinion of the United States District Court (R. 51) is reported at 203 F. Supp. 171.

The judgment of the Court of Appeals was entered on January 11, 1963 (R. 112). A petition for a rehearing *en banc* was denied on February 5, 1963 (R. 113, 114). The petition for a writ of certiorari was filed March 15, 1963. Certiorari was granted on May 13, 1963 (R. 118; 373 U. S. 908). The jurisdiction of this Court rests upon 62 Stat. 928; 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the Court below, in holding that the question of substantive arbitrability is for the court, and not for the arbitrator to decide, actually held that the collective bargaining agreement between Petitioner's predecessor and the Union did not terminate upon the merger of the predecessor company into the larger non-unionized Petitioner, and, if it did not so hold, does the collective bargaining agreement, in fact, terminate upon such merger?

2. Are the questions of procedural arbitrability, questions of whether the Union has complied with the grievance machinery specified in the collective bargaining agreement, for decision by the Court or by the arbitrator, and if for decision by the Court, has the Union satisfied the requirements of the agreement in this case?

3. Whether a Court may direct arbitration as to the nature of, and the proper remedy for implementing employees' rights to seniority, pension plan, job security and grievance machinery and vacation and severance pay, claimed by a Union under a collective bargaining agreement with a Company merging with a larger non-unionized Company, where the merger takes place and arbitration is sought, during the life of the said agreement and where such rights are claimed to continue and to accrue after the termination of the contract?

4. Is the Union the proper party to conduct such an arbitration proceeding after a merger by a Company with which it was in collective bargaining relationship, with a larger non-unionized Company?

Statutes Involved

The pertinent section of the Labor Management Relations Act and Section 90 of the New York Stock Corporation Law are quoted at page 3 of Petitioner's brief.

Statement

This suit was brought by the Respondent, DAVID LIVINGSTON, as President of District 65, Retail, Wholesale and Department Store Union, AFL-CIO (the "Union"), to compel Petitioner ("Wiley") to arbitrate issues relating to a collective bargaining agreement made by the Union with Interscience Publishing Co. ("Interscience"), which four months prior to suit had been merged into Wiley (R. 4).

The District Court had jurisdiction of the suit under Section 301(a) of the Labor Management Relations Act.

The District Court denied the order to show cause for an order directing arbitration (R. 43, 56). The Court of Appeals reversed and directed arbitration in accordance with its opinion (R. 107). A petition for a rehearing *en banc* was denied by the Court of Appeals (R. 112).

The Facts

While the facts are sufficiently set forth in the opinion of the Court of Appeals, a brief outline may be of further assistance. The Union and Interscience had a collective bargaining history going back to 1949, the most recent contract being dated February 1, 1960 and expiring January 31, 1962 (R. 76). In the early summer of 1961 word reached the Union employees that Interscience was joining forces with Petitioner herein, both being engaged in the manufacture and distribution of scientific books. The Union immediately addressed a letter to the Petitioner's counsel advising him, among other things, that "any impairment of the rights of the employees would be resisted to the fullest possible extent under the Law" (See *infra*, p. 6). Both Wiley and Interscience ignored this letter until September 19, 1961 when, on the initiation of Petitioner's counsel, a meeting was arranged between the parties wherein Petitioner and its representa-

tives confirmed the fact that there was to be a merger and flatly announced that the collective bargaining agreement which had at that time had about five months to run would be terminated on the merger and that all rights of the employees thereunder would cease and that the Union's rights would likewise terminate (R. 58, 62, 69).

There then ensued a series of telephone conversations and conferences extending to January 4, 1962 when attempts were made by both sides to dispose of that problem. The details of the conversations are set forth in the course of the argument herein but, suffice it to say, the Union insisted upon its full rights and those of the employees and told the Company "time and again, that unless we could work out a settlement of our controversy we would have to go to arbitration or litigation or take appropriate steps to enforce compliance with the contract" (R. 68). Throughout these lengthy conversations and negotiations, at no time did the Company raise the question of compliance with the grievance machinery (R. 68).

On October 2, 1963, the merger took place (R. 79). District 65 and the employees were notified that there was no more contract and no more Union.

This action was commenced on January 23, 1962 to compel arbitration of five issues: (1) the seniority rights; (2) contribution to the Union's Security Plan and Pension Fund; (3) continuation of job security and grievance provisions; (4) severance pay; and (5) vacation pay. The Union contract provides for seniority (R. 15); welfare and pension contributions (R. 24); job security and grievance procedures (R. 17, 27); severance pay (R. 23); and vacation pay (R. 20). Further facts will be referred to as necessary to the argument.

While the Petitioner attempts to set forth additional facts, there are many inaccuracies contained in its presentation.

The first inaccuracy in Petitioner's brief consists in a statement that:

> "Following the merger, the Interscience employees were integrated into Wiley's operations and thereafter no longer constituted a separate or distinct bargaining unit (R. 58)" (Pet. Br. 5).

The reference by Petitioner to page 58 of the transcript of record does not support the Petitioner's conclusion. It merely sets forth that on September 19, 1961, counsel for the Petitioner prophesied to the Union representatives what would happen on October 2 when the merger became effective. There is, in fact, no evidence of integration or that Interscience employees no longer constitute a separate or distinctive bargaining unit.

The second inaccuracy in the statement of facts made by the Petitioner lies in its allegation that the Union has not claimed to represent a

> "* * * a majority of any appropriate bargaining unit in the Wiley establishment."[2] (Pet. Br. 6)

Footnote 2 at page 6 of Petitioner's brief continues this inaccuracy by saying

> "* * * even though they (Interscience employees) no longer constitute by themselves an appropriate bargaining unit." (Matter in parenthesis ours)

Implicit in the Union's entire case, both in its complaint (R. 3) and in its supporting papers (R. 61) is the claim of the Union that it represents the former Interscience employees. Repeated assertions by the Petitioner in its brief that the former Interscience employees do not constitute an appropriate bargaining unit are simply unsupported in the record on any factual basis. Usually it is the National Labor

Relations Board that must of necessity consider a myriad of facts and conduct an intensive investigation in order to determine what constitutes an appropriate bargaining unit and, while it may be important to Petitioner's position, the record is barren of this factual support.

While the Petitioner briefly refers to the Union's letter of June 27, 1961, in view of its importance, the entire letter is set forth:

"Dear Mr. Lieb:

District 65 has consulted us with respect to how the proposed 'joining forces' with House of John Wiley & Sons, Inc. by Interscience Publishers Inc. would affect the rights of their employees, members of District 65, and without limitation, their right to continued employment. While we do not have all the facts with respect to the 'joinder' of forces, according to their own announcement 'the publication and the distribution of our (Interscience) books' is to continue. We have come to the opinion that, under the agreement between the parties, our employees are entitled to continue working notwithstanding such joinder, and we call upon you to advise your client to see to it that the employees are not terminated from employment. Of course, any impairment of the rights of the employees will be resisted to the fullest possible extent under the law." (R. 57)

Petitioner's brief states that on June 27, 1961

"* * * the Company told the Union that it should feel free to discuss the merger with it at any time." (R. 77-78) (Pet. Br. 6)

What the Petitioner fails to state is: it was not the "Union" that was so "informed". It was not the "Company"

which did the informing but a vice-president who talked to the employees (R. 77, 78). The vice-president never appears again in this case and it may be assumed that this conversation was an informal casual affair.

In the same vein is the statement that:

> "On September 19, 1961, Interscience's counsel met with Union counsel and Union representatives." (Pet. Br. 6)

Petitioner, however, fails to state that this meeting was initiated by the Petitioner and was the first answer by the Petitioner to the Union's letter of June 27, 1961 (R. 58, 62, 69 (fol. 72)).

Another inaccuracy in Petitioner's brief (p. 6) is its attempt to limit the Union's position merely to representing the employees

> "* * * until the expiration of the contract on the following January 31."

While the Union certainly insisted upon such representation during the term of the contract, since that was an important part of the problem then before the parties, the Union never intended to limit its rights to this period. In the first place, the letter of June 27, 1961, protested against "any impairment of the rights of the employees" (R. 58) and it is clear that the Union would continue to protest any such impairment. Also, the

> "Union took the position that the Union should continue to represent the employees even after the merger, and that the rights of the employees continue unaffected by the merger." (R. 62)

There was no limitation of time in any of its protests and positions.

Indeed in the discussions between the parties, including the first meeting between them on September 19, 1961, the Union counsel called Petitioner's counsel's attention:

> "* * * to the recent decisions which had sustained the rights of employees notwithstanding removal of the plant or termination of the contract. We discussed seniority rights and severance pay as well." (R. 62)

Also during the second meeting between the parties on September 26, 1961, the Union restated its position on Union recognition and the continuation of the contract (R. 62, 63, 67, 68).

While Petitioner's brief sets forth some of the views expressed by it at the September 19, 1961 meeting, it fails to set forth, that at said meeting Petitioner's counsel stated

> "* * * that some jobs might be lost as a result of the combination of operations * * *." (R. 59)

and that at a later telephone conversation on September 28, 1961, the Petitioner refused to grant Interscience employees any seniority rights and stated that if the Union insisted upon such request, Petitioner would withdraw its offer to make severance payments and would hold no further conversations with the Union (R. 60, 61). Petitioner fails to state that at the earlier meetings between the parties the Union was informed that about 25 percent of the employees would not be at their jobs at Wiley; and it was only

> "As a result of these conferences the Company finally yielded to the extent that it agreed to continue all the employees in their jobs." (R. 63, 64)

Petitioner's brief continues in this vein:

> "The issues now sought to be arbitrated were not even discussed. The conversations before and after the

> merger related to rights during the remaining term of the contract (R. 64, 68). And even some of these, as asserted in the complaint, were not referred to except by the catch-all phrase 'other rights' (R. 64) although the Union says that employees unnamed raised them with it (R. 67)." (Pet. Br. 11)

In view of the actual facts, it is somewhat shocking to find Petitioner making such unwarranted assertions.

During the September 28, 1961 conversation between the parties, the Union

> "* * * requested, however, that the Interscience Union employees who entered Wiley employment should do so with their seniority rights vested in them." (R. 60)

The Union was insistent in its position (R. 61). Throughout the six meetings between the parties, the Union:

> "* * * at all times, insisted upon recognition of the Union contract and that the rights of the employees be fully protected as they had accrued and become vested under the Union contract." (R. 62)

The Union constantly stated, without specifying any time:

> "* * * that the rights of the employees continue unaffected by the merger." (R. 62)

During additional meetings between the parties attended by Union representatives and their counsel, the Union:

> "* * * specifically insisted upon the continuation of the contract, upon seniority rights and grievance machinery and upon the other rights of the employees." (R. 64)

It was because of the issues of seniority, job security, grievance procedures, severance pay, vacation pay; and pension,

medical disability and health insurance payments both accruing during and after the termination of the contract, that the Union was unable to settle the controversy with the Company (R. 67). The Company was "made fully aware of the issues and problems" (R. 69). In fact, it was the position of the Petitioner that it *"never, never"* would *"in a million years"* agree to any disposition which would continue the rights of the employees which precipitated this litigation (R. 69).

It is small wonder, therefore, that this is the first time that the Petitioner contends that the issues now sought to be arbitrated were not discussed.

The complaint (R. 3), in alleging refusals by the Petitioner to recognize the property rights of the Interscience employees under the collective bargaining agreement "and otherwise beyond January 30, 1962", is further evidence that the Petitioner was not surprised by the issues presented by the Union for arbitration (R. 5, 8, 9). Particularly, with respect to the Basic Crew Clause which obligated the Petitioner to retain 26 "jobs", the complaint alleges that the Company:

> "* * * has refused to continue said 'jobs' and to obligate itself to continuance of same, with all the benefits and rights appertaining thereto." (R. 9)

Again at pages 59 and 62 of its brief, the Petitioner unjustifiably seeks to give this Court the impression that the issues as presently framed were not discussed with Petitioner prior to the commencement of this action. The Union calls attention to the fact that nowhere in the original District Court answering papers of the Petitioner, is there even a *scintilla* of a claim that the issues, as presently tendered, were not fully discussed. *See* Mr. Lieb's affidavits (R. 57 and 86) and Mr. Lobdell's affidavit (R. 73). When these

affidavits are read in the face of the complaint filed in this case (R. 3) and the petition attached to the original Order to Show Cause (R. 44), it should be clear beyond peradventure that there was full discussion of these issues prior to the commencement of this proceeding.

If there is any proper foundation for the Petitioner's claim to surprise, it may be confidently stated that its affidavits submitted on the Order to Show Cause would have most certainly complained to the lower courts of such a situation and the lower courts would certainly have referred to such contentions at some point in the detailed opinions which were rendered in these cases.

While the Pension Plan of the Petitioner was made applicable to the employees, this action on its part is purely non-obligatory and the Company at all times refused to obligate itself to continue with the Union Pension and this refusal antedated the filing of the complaint (R. 9).

Because the petition for the writ of certiorari does not raise this question, this may be an additional reason for disregarding this point. *See,* Supreme Court Rule 40 (d) (2).

The Petitioner's assertions that none of the Interscience employees has asserted a grievance or raised any issue with Wiley about the terms and conditions of employment (Pet.'s Br. 10), is sharply contradicted by the Union (R. 66, *et seq.*).

Another inaccurate statement contained in Petitioner's brief is its assertion that

> "The grievance procedures prescribed by the agreement 'were completely ignored' by the Union." (p. 11, Pet. Br.)

Footnote 4, page 11 of Petitioner's brief again sweepingly and erroneously states that this was admitted by the Union in the Turbane affidavit. The fact is quite to the contrary,

as a reference to the record clearly shows (R. 68). The Turbane affidavit states:

> "* * * from the very first letter written by our counsel on June 27, 1961, down to the very last conference held on or about January 4, 1962, we consistently made it clear to the Company that we would do everything within our power to protect the employees' rights. We specifically told the Company and its representative time and again, that unless we could work out a settlement of our controversy we would have to go to arbitration or litigation or take appropriate steps to enforce compliance with the contract. It comes with exceedingly ill grace on the part of the Company [fol. 79] to take the position of alleged lack of compliance by the Union with the grievance machinery of the contract. We had at least six meetings; engaged in a great deal of correspondence, and held several telephone conversations—all dealing with this subject, and the Company of course, was fully aware of the issues involved. At no time did the Company ask for or seek any other grievance procedures. Now, it is wholly improper for it to raise this question of alleged technical non-compliance by the Union. And as a matter of fact, it was the Company which initiated the grievance procedures followed in this case because it was Mr. Lieb, who in mid-September of 1961, called our counsel on the telephone and arranged for the first conference of September 19th (page 2 of Mr. Lieb's affidavit)." (R. 68, 69)

The facts are clear that the Union did not completely ignore the grievance procedures prescribed in the agreement. It made the grievances the subject of conference after conference, telephone conversation after telephone conversation and correspondence. Surely, all such communications be-

tween the parties should be held to be a substantial compliance with the grievance machinery of the contract.

It is most important to bear in mind that Wiley has no Union and there is no established policy with respect to "seniority rights," "job security," "grievance procedures" or "severance pay" (R. 77). While Interscience employees were ultimately covered by the Wiley Pension Plan, the Union Plan is greatly superior to the Wiley Plan (R. 48).

Summary of Argument

I

The Court of Appeals *did* determine that Wiley was obligated to arbitrate the issues tendered by the Union and did not refer that question to the Arbitrator. It held that this was a matter of substantive arbitrability which was for the Court to decide and it did so decide. The Union relies on Section 90 of the Stock Corporation Law of New York to bind Wiley as the surviving corporation of the merger. Even if the Union is wrong on this, as the Court of Appeals held it was, then Wiley is so bound as a matter of Federal Common Law.

II

The issues tendered for arbitration are arbitrable as being within the scope of the contract. Claims of seniority, severance pay, vacation pay, pension contributions, job security and the like, both accruing before the expiration of the contract and after the termination of the contract are *bona fide* claims. Certainly, those rights accruing prior to the termination of the contract are arbitrable beyond peradventure of doubt. Those obligations continue and accrue even after the contract terminates and are embraced within the term "seniority" and "jobs" which were sustained in *Zdanok* v. *Glidden*, 288 F. 2d 99 (2 Cir. 1961), aff'd other g'd, 370 U. S.

530 (1962), reh den, 371 U. S. 854 (1962). "Seniority" and "jobs" constitute a bundle of legal relations between the Employer and the Union and the employees, and under *Zdanok*, unless the same rights continue to the employees, even after the termination of the contract, then "seniority" and "jobs" become meaningless.

The Union is seeking not only to arbitrate the rights which vested and matured prior to the termination of the contract, but is also seeking to arbitrate the rights vested prior to the termination but which have continued to flow after the contract terminated. It is not for the Court to determine the nature of these rights. To do so would ignore the teachings of the *Steelworkers* decisions. *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

In effect, the Petitioner is asking this Court to depart from the rulings of the *Steelworkers* cases. As the Court of Appeals held, following the teachings of these cases, it is up to the Arbitrator to carry out the bargain of the parties so that they have the benefits of his creativity and expertise in determining the nature of, and proper remedy for implementing, the rights as to seniority, pension plan, job security, grievance procedures and vacation and severance pay. Any other decision would contravene the

> "perfectly clear intention that the questions propounded by the Union be arbitrated." (R. 100, opinion of the Court of Appeals).

This Court has held that the termination of a contract does not bar arbitration and that the Union's representation rights are not in anywise affected. *United Steelworkers* v. *Enterprise Wheel, supra.*

An important part of the Union's argument which permeates its entire case is that the Union is the proper enforcing agency and that the rights of the employees flow through it. However, even if it is held that the Union's representation rights had ceased, the employees' rights nevertheless continue, limited to their individual relationships which still continue, and in any event, must be held to survive and accrue.

III

The Court of Appeals correctly held that matters of procedural arbitrability were for the arbitrator. If the Union be wrong in this contention, then this Court should hold that the facts establish substantial compliance by the Union with the grievance machinery under the Union contract and a waiver by the Company to insist on such provisions.

POINT I

The Court of Appeals held that substantive arbitrability was for the Court and held that Wiley was obligated to arbitrate.

The opinion of the Court below clearly and unequivocally holds that Wiley was obligated to arbitrate the issues tendered by the Union and did not refer that question to arbitration.

Circuit Judge Medina clearly stated:

> "* * * We also hold, as matter of federal law, (1) that the agreement and rights arising therefrom were not necessarily terminated by the consolidation. * * *" (R. 90)

Again, later in its opinion, the Court made this clearer:

> "* * * Did the consolidation abruptly terminate the collective bargaining agreement and the rights of the Union and the employees created or arising thereunder?

We think it clear and we decide and hold that the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreements (*Textile Workers Union* v. *Lincoln Mills, supra,* at 453-4; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 1960, 363 U. S. 574, 578; *Local 174, Teamsters Union* v. *Lucas Flour Co., supra,* at 105; *Drake Bakeries Inc.* v. *Local 50,* 1962, 370 U. S. 254, 263) can be fostered and sustained only by answering this question in the negative. * * *" (R. 93)

A bit further on in its opinion:

"* * * we do hold that the consolidation did not *ipso facto* terminate all rights of the Union and the employees created by or arising out of the collective bargaining agreement, * * *" (R. 93)

And still further:

"* * * Our decision, then, cannot be construed as holding generally that collective bargaining agreements survive consolidation. We merely hold that, as we interpret the collective bargaining agreement before us in the light of Supreme Court decisions enunciating the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreement, we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract." (R. 94)

Besides these specific excerpts from the decision hereinabove quoted, the Court of Appeals' entire opinion is devoted to a discussion of the distinction between substantive arbitrability and procedural arbitrability and throughout its opinion, the Court recognized that substantive arbitrability

is for the court but that procedural arbitrability is for the arbitrator. The Court's opinion shows a complete awareness that the existence of a promise to arbitrate is a question of substantive arbitrability and it holds in favor of the Union on this question of substantive arbitrability. There is nothing on this aspect left for the arbitrator to pass upon.

The opinion of Circuit Judge Kaufman, as a concurring opinion, cannot be interpreted in any way contrary to the Court's opinion, and must be read so as to make it consistent with the majority opinion. Thus, the concurring opinion must be found to hold that the Union may proceed to arbitration against Wiley under the contract.

Notwithstanding the ruling of the Court of Appeals that Section 90 of the New York Stock Corporation Law is not controlling (R. 92), the Union respectfully maintains, that that Section is binding upon the Federal Court. The language of the statute is so broad and extensive that it must be deemed to cover "any liability or obligation", including the obligations under a collective bargaining agreement.[1]

A collective bargaining agreement is a contract binding upon both parties until terminated by the law. See, *In the Matter of Klqber Brothers, Inc.*, 173 F. Supp. 83 (S. D. N. Y. 1959); *Barth* v. *Addie Co.*, 271 N. Y. 31 (1936); *Parker* v. *Borock*, 5 N. Y. 2d 156, 156 N. E. 2d 297 (1959); *Hudak* v. *Hornell Industries*, 304 N. Y. 207, 106 N. E. 2d 609 (1952); *McDonough* v. *Smith*, 43 CCH L. C. ¶ 40,414 (Calif. Super. Ct. 1961), (no official citation).

The effect of Section 90 is merely to bring about a change in the corporate stock structure, and in this way may be analogized to any other situation where stock ownership has changed. Corporate obligations still continue unchanged.

This is also the law of the National Labor Relations Board. See, *e.g.*, *Cast Metal Co.*, Case No. 4-RC-69, 22 LRRM

[1] *See:* Fletcher, *Cyclopedia Corporations* (Perm. Ed. 1961 Revised Vol.), Sec. 7086, p. 108, Sec. 7109, p. 152, *et seq.*; Williston *Contracts*, (Vol. 6, rev. ed.), Sec. 1960, p. 5502.

51 (1948); *Dunkirk Broadcasting Corp.*, 120 NLRB 196 (1958); *National Supply Co.*, 16 NLRB 304 (1939); *In the Matter of Andrew Jergens Co.*, 43 NLRB 457 (1942); *Autopart Mfg. Co.*, 91 NLRB 80 (1950), suppl'd 92 NLRB 120 (1950); *Hoppes Mfg. Co.*, 74 NLRB 853 (1947), enf'd 170 F. 2d 962 (6th Cir. 1948).

While ordinary state decisional law cannot control Federal Courts in suits under Section 301, statutory mergers under state merger statutes must be controlled by the New York statute. In any event, be this as it may, the Court of Appeals dealt with this point as a matter of Federal law, and said it must answer in the negative the question of whether the consolidation terminated the contract and the rights of the Union and employees created or arising thereunder (R. 93).

The Petitioner cannot dilute the importance of this holding by the Court of Appeals by making the contention that what is of basic importance is whether the bargaining unit continues in existence and, whether the employer's enterprise, regardless of its ownership, remains basically the same (Pet. Br. 27). This contention was urged upon and rejected by the Court of Appeals. The Court of Appeals pointed out, quite correctly, that the issue in this case was of the binding character and the meaning of contractual rights under a pre-existing agreement (Fn. 3, R. 95). The Petitioner can point to no case holding that a pre-existing contract is annulled by reason of consolidation. This was recognized by the Court of Appeals as being the essential problem of this case.

The cases relied upon by the Petitioner at this point are readily distinguishable. In *Livingston* v. *Gindoff Textile Corp.*, 191 F. Supp. 135 (S. D. N. Y. 1961), the Union was seeking to hold a brand new corporation formed by certain minority stockholders of a dissolved corporation with which the Union had contracted. This is a far cry from releasing a survivor corporation, consolidated with the contracting corporation, from contractual liability.

Administrative Decision of General Counsel, Case No. SR-1880, 50 LRRM 1078, 1962 CCH NLRB ¶ 11,208, cited by the Petitioner (Pet. Br. 28) also demonstrates the complete error of Petitioner's argument. In that case, one company had sold its plant to another independent company, and of course the second new company was held not to be obligated by the contract of the former employer.

In *Administrative Decision of General Counsel* Case No. K-313, 37 LRRM 1457 (1956), the same situation is revealed. A new company took over the physical assets of the old contracting company and the General Counsel of the National Labor Relations Board held that the new company was not bound by the contract of the old company.

The *Administrative Decision of General Counsel*, Case No. K-64, 36 LRRM 1521 (1955), is to the same effect.

The other cases relied upon by Petitioner, as to whether a successor employer is required to assume its vendor's obligation to bargain with a recently certified union, simply have no relevance to this case, involving as it does the issue of an existing contract. A duty to bargain may not necessarily follow the transplanting of one group of employees into another and larger group, where that duty is sought to be enforced before the National Labor Relations Board; but where there is merely a change in the ownership of stock either by a purchase of the stock or by a merger or consolidation, then the contractual rights under existing agreements continue unchanged.[2]

Petitioner's reliance on these cases conclusively demonstrates the inherent weakness in its entire case.

Of course, all these contentions may be advanced before the Arbitrator and a real record made of the underlying facts as to appropriate bargaining unit. See *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962); *Carey* v. *General*

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[2] *See*, Fletcher *Cyclopedia Corporation* and Williston, *Contracts*, fn. 1, p. 17.

Electric Co., 315 F. 2d 499 (2d Cir. 1963), cert. denied, — U. S.; — 47 CCH Lab. Cas. ¶ 18,151; *I. U. E.* v. *Westinghouse Electric Corp.*, 218 F. Supp. 82 (S. D. N. Y. 1963).

It should be remembered that Wiley has no union and none of its employees is represented by a union (Pet. Br. 5). It should also be remembered, as stated by the Court of Appeals (R. 94), that Wiley was aware of Interscience's contract with the Union (R. 74).

There are impelling reasons to follow the rule of the Court below that a pre-existing contract continues binding notwithstanding merger or consolidation and these reasons are fully discussed and form the entire basis of the Court of Appeals' decisions.[3] The Court of Appeals relied upon the decisions of this Court to establish Federal Common Law. The Federal law, established with reference to arbitral procedures, can be enforced and sustained only by holding that a contract continues notwithstanding a purchase of stock or a stock consolidation (R. 93).

The Court of Appeals relied upon *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95, 105 (1962); *Drake Bakeries Inc.* v. *Local 50*, 370 U. S. 254, 263 (1962). Any other result in this day and age of frequent mergers and consolidations and reorganizations would result in labor relations chaos and would virtually undermine the sacredness and validity of collective bargaining agreements.

The Union submits that "stock deals" involving the transfer or merger of the stock of the contracting industry or

[3] *Cf. Brotherhood of Locomotive Engineers* v. *Chicago & Northwestern Railway Co.*, —— Fed. 2d —— (8th Cir., 1963) 46 CCH Lab. Cas. ¶ 18,125 and Section 5 (2) (f) of the Interstate Commerce Act mandating the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected by a merger." For four years thereafter the employees cannot be "in a worse position with respect to their employment."

business normally presents no great problem as to the continuation of the collective bargaining agreement, and the Court, in this case, should affirm the Court below which so held. Even if this were not a "stock deal" but an "assets deal," involving the transfer or sale of the physical assets of a business, there is sufficient authority for holding that the collective bargaining agreement still continues to be binding. See cases cited, *supra*, at pps. 17-18; also, *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U. S. 574 (1960); see also pp. 26, 27 of Petitioner's Brief. The Union contract is more than a contract this Court has informed us. It is a way of life for the employees and transfer of even only physical assets should carry with it the code of governing the whole employment relationship.

POINT II

The issues tendered by the Union for arbitration are arbitrable.

No better discussion of the arbitrability of the issues tendered by the Union can be found than in the learned opinion of the Court below (R. 97).

The Court below correctly held: it is not the function of the Court to express any opinion as to the nature of, and proper remedy for implementing the rights, of seniority, job security, pension pay, grievance procedure, and vacation and severance pay and cited as authority *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 567-9 (1960) (R. 98).

Indeed, Congress itself in Section 203(d) of the Labor Management Relations Act of 1947 has mandated that:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable

method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

Section 16.0 of Article XVI of the Union contract provides for arbitration of:

> "Any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement, * * *" (R. 27)

This broadest of all arbitration clauses clearly, within the spirit of the *Steelworkers* decisions, *supra*, renders the issues arbitrable.

Surely, questions of severance pay, seniority, job security, pension contributions, grievance procedure and vacation pay by any definition, come within the scope of the contract.

As the Court of Appeals said, specifically referring to these issues:

> "* * * even if such claim is wrong or even untenable or frivolous, this does not bar arbitration. *United Steelworkers* v. *American Mfg. Co., supra,* at 568-9" (R. 100).

This reference to this Court's decision in the *American Mfg. Co.* case, *supra,* is from the opinion of Mr. Justice Douglas who stated at pages 568-9:

> "* * * The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.
>
> "* * * When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining

agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal."

Petitioner's chief complaint is that the Court of Appeals failed to make a critical analysis of the merits of the Union's claim. Upholding this complaint is tantamount to a reversal of this Court's rulings as to what is the function of the court in arbitration proceedings.

The primary claim of the Petitioner that the rights contained in the issues tendered by the Union do not have their roots or foundation in the Interscience contract is simply not justified.

1. Seniority rights, accruing both before and after termination of a union contract, are so clearly rooted in the contract that it is somewhat puzzling to understand the Petitioner's position to the contrary. Seniority rights are insurance that when an event does occur the service period of the employee will be taken into consideration. Merely because no event has yet occurred which would bring the security rights into operation, does not suggest the nullity of such rights at the Wiley establishment which also is, in effect, the former Interscience establishment. *Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961), aff'd other grounds, 370 U. S. 530 (1962), rehearing denied, 371 U. S. 854 (1962), involved seniority rights which, of course, were rooted in the former collective bargaining agreement theretofore terminated.

2. Where the employees have been working under collective bargaining agreements under the terms of which the Company has been making contributions to a union pension plan, is it frivolous for the employees to expect that the contributions shall continue notwithstanding the termination of the contract? Is such an expectation rooted in the contract? *Zdanok* v. *Glidden, supra,* holds that seniority

rights are so rooted notwithstanding the termination of the contract. The "job" and "seniority rights" are a bundle of legal relations containing many attributes. "Seniority rights" or "jobs" would be valueless unless the "job" that existed prior to the termination of the contract was to continue. Nothing is more important to an employee than his pension rights which constitute a most vital attribute of the "job."

In *Goodall-Sanford, Inc.* v. *United Textile Workers, Local 1802*, 233 F. 2d 104, 110 (1st Cir. 1956), aff'd 353 U. S. 550 (1957); the Court said:

> "* * * in view of the increasingly complex use of compensation in the form of 'fringe benefits', some types of which inherently are not payable until a time subsequent to the work which earned the benefits, we believe that there may be terms within a union-employer contract whose effect is not necessarily limited to the continuance of the living relationship that exists while the business is being operated as a going concern."

As one management expert stated, in discussing the *Zdanok* case, *supra*:

> "Another interesting point in this case is the implication that maybe something besides seniority would be found to be carried over to the new plant. At one point, the Court says, 'The benefits created for the employees under that contract should not be said to be unilaterally terminated by mere change of location.' Now what do 'benefits' mean? Does this mean that an employer who moves from Detroit to Lebanon, Tennessee also has to carry his wage structure with him? Presumably if one accepts the idea that seniority becomes a vested right there is no reason to pre-

> vent carrying the thought to its logical conclusion and assume that a wage rate, once earned, is also a vested right."[4] (R. 46)

If a wage rate once earned is a vested right, then surely pension payments, part of wages, may also be deemed a vested right by an arbitrator. This of course is the basic question of this case and all the Union herein seeks is the opportunity to present the facts to an arbitrator so that he may tell the Union and the employees what rights remain with the employees. The record is completely silent as to when the unit at Interscience was physically broken up and when the physical assets of Interscience and the employees physically moved over to Wiley. This is a fact which should be determined by the arbitrator since, in any event, assuming that the contract survived the merger for only this brief time with the bargaining unit intact, until the time of physical removal of employer's equipment, the doctrine of accretion could not apply. While Interscience continued operating at its old location even after the merger, once the Court determines, as did the lower court, that the contract continued, there can be little question that the rights of the employees and of the Union and under the contract continued in full force and effect. Even the Petitioner concedes this (p. 26, Pet. Br.).

In the remanded *Zdanok* v. *Glidden* case, 216 F. Supp. 476 (S. D. N. Y. 1963), the plaintiffs did contend that notwithstanding the termination of the contract:

> "* * * the collective bargaining agreement obligated defendant to employ them at Bethlehem without loss of seniority, pension, welfare, and other rights." (p. 477)

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[4] Eugene A. Hoffman, Labor Relations Manager, Minneapolis-Honeywell Regulator Co., in an article entitled *"Do the Seniority Rights of Employees Survive an Expired Contract?"* presented to the Industrial Relations Committee of the National Association of Manufacturers.

The defendant still continued to claim:

> "* * * that under federal law, seniority and other rights cannot be held to have survived the good faith closing of the Elmhurst plant." (p. 478)

The opinion in the remanded case thus establishes that continuing pension, welfare and other rights were involved in the *Zdanok* case, *supra*, in addition to seniority rights.

3. The third issue tendered by the Union related to the continuance of the "job security and grievance provisions of the contract." By this issue the Union intended to obligate the Company to the continuation of some protection to the employees notwithstanding the merger of the termination of the contract by its terms. The Union wanted to provide the employees with some formal and binding machinery which would not leave the employees at the mercy and whim of the Petitioner. This fear was engendered by the announcement of the Company that it would discharge 25 percent of the employees on the merger (R. 63) and it was only after protests by the Union that the Company agreed to continue the employment of all the employees (R. 64). The Union insisted that the arbitrator determine whether the seniority rights of the employees could be invaded after January 31, 1962 without the Company being called upon before some authoritative body to explain its action.

4. The Company concedes (Pet. Br. 38), at least as to severance pay accruing up to January 31, 1962, arbitration could proceed as against Interscience. The Union submits that the surviving corporation, Wiley, must be made liable for such severance pay and not freed from such liability merely by virtue of the merger. Severance pay is wages and is part of "seniority rights" and the "job." Surely there is here sufficient nexus with the contract so as to enable arbitration to take place as to the continuation of accrual of such rights even after termination.

5. The same position is taken by the Union with respect to vacation pay which is again part of "seniority" and "job." It may be appropriate to point out that job security and seniority are both very closely allied. Job security consists of three elements, the first one being seniority protection against layoff and for promotion and recall. The second element in this case can be found in the 26 jobs that were guaranteed to the Union (R. 39). The third element is, that discharge must be for cause (R. 17), with grievance machinery to protect employees against improper discharges (R. 27).

The Petitioner relies heavily on the *Proctor & Gamble Independent Union* v. *Proctor & Gamble Mfg. Co.*, 298 Fed. 2d 644 (2nd Cir. 1962). This case was decided by the same Circuit Court that decided the case at bar and distinguished it on the ground that the case at bar was commenced prior to the termination date of the contract (R. 93), and that the grievances involved in the within case, as distinguished from the *Proctor & Gamble* case, arose during the life of the contract.

See also, *Piano Workers Union* v. *Kimball Co.*, 54 LRRM 2212 (N. D. Ill., September 13, 1963).

Of the *Steelworkers* trilogy, the *Enterprise Wheel & Car Corp.* case, *supra*, is in some aspects the most pertinent to the case at bar and incidentally, sustains the Court of Appeals' distinction of *Proctor & Gamble, supra*. There, the arbitration hearing itself was after the termination of the contract and, of course, the Court held that the arbitration was proper, thus effectively disposing of Petitioner's contention that the Union is not the proper party to enforce the rights of the former Interscience employees. There, as here, the grievance arose during the lifetime of the contract and involved the discharge of employees. This Court held that the award of the arbitrator in directing reinstatement notwithstanding termination of the contract was

proper and that back pay could be awarded, not only for the period during the life of the contract, but also for the period subsequent to the termination of the contract to the date of reinstatement. The dissenting opinion, while agreeing that all rights which had accrued during the term of the collective bargaining agreement could be awarded to the Union even after the termination of the contract went on to say, at pages 601-2:

> "* * * But surely no rights *accrued* to the employees under the agreement after it had expired. * * *"
>
> "But when that agreement expired, it did not continue to afford rights *in futuro* to the employees—as though still effective and governing. * * *"
>
> "Once the contract expired, no rights continued to accrue under it to the employees. Thereafter they had no contractual right to demand that the employer continue to employ them, and a fortiori the arbitrator did not have power to order the employer to do so; nor did the arbitrator have power to order the employer to pay wages to them after the date of termination of the contract, which was also the effective date of their discharges."

The majority opinion should be read in the light of the dissenting opinion and surely is a holding to the effect that the right to reinstatement did *not* terminate notwithstanding the fact that the arbitration proceedings and the arbitrator's award came after the termination of the contract. The direction of back pay to the date of reinstatement surely is a holding, contrary to the dissenting opinion, that rights *do* accrue to employees even after the expiration of the contract and rights in future do continue to be afforded to employees after the expiration of the contract.

The majority opinion of the Supreme Court should also be read in the light of the Fourth Circuit's decision in that case, 269 2d 327 (4th Cir. 1959). The Court of Appeals in the *Enterprise Wheel & Car* case had held that the arbitrator's award for back pay, subsequent to the date of termination of the contract and the requirement for reinstatement of the discharged employees, could not be enforced. The nub of its opinion was as stated, at page 331:

> "* * * collective bargaining agreements do not create a permanent status or condition, or give an indefinite tenure, or extend rights created and arising under the contract beyond its life, but that these rights remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute. * * *"

It was this view that the Supreme Court reversed; so it must be concluded that the *Enterprise* case does hold that the termination of the contract does not sound the death knell of all employee rights thereunder.

Similarly, cases cited by the Court of Appeals which have recognized the possibility of "vested" rights (R. 97, fn. 4), but cavalierly disregarded by Petitioner (Pet. Br. 38, 39) will bear further study and analysis. For example, in *Botany Mills* v. *Textile Workers Union*, 50 N. J. Super. 18, 141 Atl. 2d 107 (1958), the Court directed enforcement of an arbitration award which had granted vacation pay to the employees. The collective bargaining agreement had terminated March 15, 1956 and the company contended that since the contract provided that the vacation pay was not payable until April 15, a layoff of the employees on the prior December 30 disentitled the employees to any vacation pay. The Arbitrator disagreed and rendered an award accordingly and it was this award that was finally enforced by the Court.

Here again the Company contended that since vacation pay was not payable until April 15, a date subsequent to the actual termination of the contract, vacation pay could not have "accrued" before such termination.

The Court said at page 29:

> "* * * The rights asserted by the defendants, if they exist, indisputably arise out of the agreement. That the actual enjoyment of the rights claimed was to occur subsequent to the termination date does not make the dispute non-arbitrable. While collective bargaining agreements are normally made for fixed periods of time, they generally contemplate renewals and a subsisting contractual relationship between the employer and the union of indefinite duration. It will therefore be commonplace that rights to which employees are entitled under a collective bargaining agreement may not actually fructify in enjoyment until after the expiration of a given contract period with reference to which they may be regarded as having been earned."

While the actual vacation pay in question in this case had been earned, for at least part of the time, prior to the expiration of the contract, this case, however, does furnish another example of rights fructifying in enjoyment after the expiration of the contract period. The Court went on to say:

> "* * * they signify nothing more than that the parties contemplated enjoyment of the benefits on a date which, because of the unforseen shutdown of the plant, occurred subsequent to the expiration of the contract. But we do not agree that this circumstance necessarily is preclusive of arbitration; neither general legal concepts nor doctrines more parochial to labor arbitration indicate such result." 50 N. J. Super. 18, 30.

Another example cited by the Court of Appeals (R. 97) and by the *Botany Mills* case, *supra*, is *In re Potoker*, 286 App. Div. 733, 146 N. Y. S. 2d 616 (1st Dep't 1955); aff'd *sub nom Potoker* v. *Brooklyn Eagle Inc.*, 2 N. Y. 2d 533, 141 N. E. 2d 851 (1957).

A reading of the Appellate Division decision will show why the court below referred to that decision rather than to the decision by the New York State Court of Appeals. In the *Potoker* case the Court directed arbitration of the controversies claimed to exist under a collective bargaining agreement which the employer claimed had been terminated by the Union. The controversies related to overtime, holiday, vacation, severance and notice of dismissal pay and, in passing, the Court said that such claims

> "* * * certainly 'arise out of or relate to' the contract which specifically prescribes arbitration as the method for determination of all disputes." (286 App. Div. at 736)

The Court held that termination was for the arbitrator to decide and the fact that the contract had been terminated did not foreclose arbitration. The Union contended that the severance pay issue "survives termination of the contract". The Court said that if the Guild could sustain its contention,

> "* * * the severance pay provisions do not perish with the agreement, survive its termination, and severance pay becomes payable on expiration of employment regardless of the date of termination of the contract." (286 App. Div. at 737)

Here again the Court was talking about severance pay which became owing during the life of the contract. This case was in 1955 and the Union apparently was not asking for severance pay for any post-contract period but the point

is that the Court does say that certain rights do continue and survive termination of the contract.[5]

In *Frank Chevrolet Corp.* v. *Meyers* (146 N. Y. L. J., December 4, 1961), 43 CCH Lab. Cas. ¶ 50,413, aff'd 33 Misc. 2d 1057 (2d Dept. 1962), the employer sought to stay arbitration initiated by the Union because of the employer's failure to remit checkoff dues and to make contributions to the pension and health and welfare funds. The employer contended that arbitration could not be had because of the termination of the collective bargaining agreement. The Court said, at page 62,355 (43 Lab. Cas.).

> "• • • In any event any claim arising after the termination of the contract goes to the merits, and such issue is properly within the province of the arbitrator. (*Matter of Potoker* [*Brooklyn Eagle*], 286 App. Div. 733 [29 LC ¶ 69,618], aff'd 2 N. Y. 2d

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[5] That such rights, and the issues tendered by the Union herein, are worthy of serious consideration, reference need only be made to the labor negotiations between *General Electric Company* and the *International Union of Electrical Workers* where the company sought and had included in the arbitration clause, the point that only express violations of specific contract language, would be arbitrable. It had announced that this was a strike issue and was the most serious block to the peaceful settlement of its labor problems. 53 LRR 340; 54 LRR 41, 97, 118. Embraced within the implied issues would certainly be the issues tendered by the Union herein and if these giants of management and labor were willing to come to the breaking point because of these differences surely it can be contended in the case at Bar that the Interscience contract permits arbitration as directed by the Court of Appeals. The Union has filed unfair labor practice charges because of the company's refusal to grant a wider arbitration clause.

Of course, before the National Labor Relations Board, a union continues to have substantial rights, even after termination of the contract. Unilateral action by the employer, following expiration of a contract would be prohibited by the Board. Thus, when a company unilaterally deprived the union representatives of seniority rights and declined to process grievances, the Board held that this constituted a violation of Section 8(a)(5) of the National Labor Relations Act. The Board said that this prohibition against the company extended to "any existing wage rate or term or condition of employment, no mat-

553 [32 LC ¶ 70,680]; *Matter of Acme Baking Corp.* [District 65], 2 App. Div. 2d 61 [LC ¶ 70,074], aff'd 2 N. Y. 2d 963 [32 LC ¶ 70,781]; *Matter of Teschner* [*Livingston*], *supra*.) 'The mere circumstance, however, that a contract has been terminated does not foreclose the arbitration of issues which arise out of and relate to it.' (*Matter of Potoker* [*Brooklyn Eagle*], *supra*, page 736 [29 LC ¶ 69,618]; *Application of Gottfried Oppenheimer, Inc.*, 140 N. Y. S. 2d 521 [27 LC ¶ 69,134]). 'The duty to arbitrate a dispute arising during the term of the agreement survives the expiration thereof.' (*Matter of International Association of Machinists, AFL-CIO, Lodge 2116* [*Buffalo Eclipse Corp.*], 12 App. Div. 2d 875 [42 LC ¶ 50,194].) An arbitration will be ordered even though it is claimed that the contract was cancelled by the act of the parties. (*Matter of Aqua Mfg. Co., Inc.* [*Warshow & Sons, Inc.*], 179 Misc. 949.)

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ter how established * * *" *Bethlehem Steel Company*, 136 NLRB 1501, 1503 (1962) "Enf. den'd on other grds, — F 2d —, 53 LRRM 2878 (3rd Cir., 1963); see also, Trial Examiner's Report, *Body & Tank Corp.*, 2 CA 9116 (not reported). Surely, if the Board finds that such rights continue even after the termination of the contract, there is enough substance in the Union's issues in the case at Bar to justify an inquiry by the Arbitrator into the nature and extent of such rights.

In the *Bethlehem Steel Company* case in the 3rd Circuit, *supra*, the Court held that contentions by the company that it was relieved of any obligation to bargain because the union's demands covered an inappropriate unit were "not tenable" citing *Brewery & Beverage Drivers & Workers Local 67* v. *NLRB* (C. A. D. C. 1958), 257 F. (2d) 194.

In the *Brewery & Beverage Workers* case, *supra*, the Court held that the company was not relieved from its duty to bargain notwithstanding a variance between the unit sought by the union and the unit later found by the Board to be appropriate where the variance was "not substantial." What is "substantial" must be determined either by an Arbitrator or by the Board and not by a unilateral act of any employer.

The Court makes it clear that the checkoff dues and the health and welfare contributions were moneys claimed by the Union to have accrued after the alleged termination of the contract. Yet the Court concludes that the claims "arise out of" and "relate to" the contract.

In *Piano Workers Union* v. *Kimball Co.*, 54 LLRM 2212 (N. D. Ill., Sept. 13. 1963), supra, p. 27, the question was whether failure to rehire former employees at a new plant opened after the termination of the collective bargaining agreement, was an arbitrable issue and the Court held that it was, saying:

> "As in the case of pension rights and retirement benefits, seniority rights extend into the future. Are these rights, which are often referred to as 'vested rights' (though perhaps improperly so), and which arise out of the terms of a union agreement to be honored only so long as the *whole* of the agreement is enforceable? Are these rights to be held for naught thereafter? Zdanok v. Glidden Company, 288 F. 2d 99, answers these questions in the negative."

The foregoing cases are submitted by Respondent, not with any claim that they are binding precedents conclusively supporting the Respondent's position on the merits of the arbitration issues, but rather they all cited to show the thinking of the courts and the National Labor Relations Board that rights do survive and continue after the termination of contracts. This discussion has been engaged in to demonstrate that the rights which do continue after the termination of a collective bargaining agreement are worthy of serious consideration by the Court and by an Arbitrator. Admittedly, this is a pioneer field and it is just this kind of a case where the expertise of an arbitrator is required.

In deciding the questions involved in this case, the Union respectfully suggests that the Court should give the utmost

consideration to the important and urgent moral, humane and sociological problems herein involved. A single glance at the schedule of comparative pensions under the Wiley plan and under the Union plan quickly highlights the difference in pension dollars payable to the employees under the two plans. By and large the pensions under the Union plan are vastly superior—in some cases almost double those paid under the Wiley plan (R. 49).

Only a moment's reflection will be sufficient to show the tremendous importance of this issue to a pensioner arriving at the age of 65. Under the Wiley plan the pensioner would find it impossible to make ends meet; while under the Union plan a modicum of comfort may be realized. Of course, this comparison is based upon the hope that the Wiley plan will be continued.

Moreover, what about the pension rights which have been earned as deferred wages prior to the termination—a question which Wiley has ignored entirely, except insofar as it has given the employees, for the moment at any rate, the coverage of its own plan.

Similar reflections with respect to severance pay would show the tremendous impact upon the employees by the Company's refusal to make any commitments concerning severance pay, not only with respect to those amounts which accrued prior to termination but those coming due after termination. This Court does not need to be reminded of the importance of severance pay in the life of an employee and the bargaining which goes on between union and employer to achieve this point of security (see R. 33, 41). Substantial amounts of severance pay have accrued to and have been earned by the employees; in some cases being in excess of $700—and to deprive the employees of a remedy with respect to such sums is unjust and contrary to law. Other employees who have not yet reached the maximum in sever-

ance pay, but who have been employed at Interscience for many years under the expectation and umbrella of severance pay should not be denied the right to have this security continued notwithstanding termination of the contract. Just as in the case of pension contributions the employees and their collective bargaining agent gave up a present *quid pro quo* for the security of future severance payments and in the expectation of the full maturity of these rights.

Similar other considerations go with the Union's insistence upon protection with respect to seniority, grievance machinery and vacations. Where employees have earned vacations by seniority, it is only fair and proper that these rights be continued and that they continue to improve notwithstanding termination of the contract (see R. 15, 20).

Several of the employees in this case are near retirement age. Others will be there shortly (R. 41). At the Employer's whim, such employees could now be cast adrift prior to retirement as this Employer threatened to do in earlier negotiations with the Union (R. 59, 64). Thus, after years of service, these older employees would face the grim necessity of starting life anew at the age of 61 and above.

Of course, these problems are not confined to the Wiley employees. All over the country we have plant closings, plant removals, mergers, consolidations, transfers and other similar business reorganizations. Contrasted with higher echelons employees, who are normally well provided for, thousands of rank and file employees are continuously being gravely affected by such upheavals and to deprive these employees of an avenue of remedy by an arbitrator would be cruel and inhuman treatment of the affected workers of this country. Such a result would

> "• • • involve manifest injustice, a circumstance not to be lightly disregarded or brushed aside; it would

be a breeder of discontent and unharmonious relations between employer and employees, and a source of unnecessary and disrupting litigation." (Opinion of Judge Medina, R. 93.)

Contrary to the claims, therefore, of the Company that the rights claimed by the Union on their face do not have any legal foundation in the Union contract (Pet. Br. 34), the facts and the law indicate quite clearly that the Union claims are verified in the Union's contract. As Judge Medina said:

> "• • • the very fact that in the instant case we are presented with such difficult issues in a new and important field as yet largely unexplored, is ample reason why we must, as we do, leave the merits to the arbitrator whose creative role in the interpretation of collective bargaining agreements has been well remarked upon. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra,* at 578-81; Cox, *Reflections Upon Labor Arbitration,* 72 Harv. L. Rev. 1482, 1490-93 (1959)." (R. 98, fn. 5)

POINT III

The Union is the proper party to enforce the rights of the former Interscience employees.

We have already alluded to the *Enterprise Wheel and Car Corp.* case, *supra,* as conclusive authority of the proposition that the Union is the proper party. This was the holding of the Court of Appeals (R. 96).

Any final doubt on this score is removed by this Court's decision in *Retail Clerks* v. *Lion Dry Goods,* 369 U. S. 17 (1962), where this Court held that a union could sue to enforce a strike settlement agreement even though the union

was not entitled to recognition as exclusive representative of the employees of the companies involved in the litigation. The Court, in referring to "members only" contracts, held that the union had status even if it were a minority union. This case strongly reinforces the position of the Union that, regardless of the merger or any alleged change in the appropriate bargaining unit, the pre-existing contract continued and the Union's status to enforce that contract was not affected.

The Petitioner bases its argument on this point on the assertion that the Interscience bargaining unit had disappeared and was integrated into the larger bargaining unit of the Wiley employees (Pet. Br. 45).

As heretofore stated at page 5, there is no proof of these facts in the record and it is essential, as a reading of the Board cases cited by the Petitioner will demonstrate, that in an appropriate proceeding the Board examine the detailed facts before arriving at any such conclusion. There has been neither such proceeding nor such investigation before any forum.

The unit issue has never been litigated for the simple reason that this is not the place nor the time to do so and this point was made by the Court of Appeals (R. 95, 96). An examination of the cases relied upon by the Petitioner will show this to be true and, by showing it to be true, will demonstrate the weakness of the Petitioner's contentions. *L. B. Spears & Company*, 106 NLRB 687 (1953), cited at page 45 of Petitioner's brief, was a representation proceeding before the National Labor Relations Board. The question was: whether two corporations constitute a single employer under the National Labor Relations Act. The Board, after examining all the facts, so held and found that the collective bargaining agreement of one of the corporations was not a bar to the representation proceedings.

Hooker Electrochemical Company, 116 NLRB 1393 (1956), was likewise a representation case under the National Labor Relations Act and here again the Board went into the detailed facts of the results of the consolidation.

In *Retail Clerks* v. *Montgomery Ward & Co.*, — F. 2 —, 47 CCH Lab. Cas., ¶ 18,232 (7th Cir. 1963), the Union had been decertified in a proper proceeding.

The other decisions relied on by Petitioner at page 46 are properly distinguished by the Court of Appeals (R. 96). All of these cases demonstrate the basic invalidity of Petitioner's entire case.

POINT IV

Procedural arbitrability is for the arbitrator.

The Petitioner seeks to clothe the question of whether procedural arbitrability is for the Court or for the Arbitrator with special gravity, by designating procedural arbitrability as "conditions precedent", a description not used by the Court of Appeals. The opinion below gives valid reasons as to why procedural arbitrability should be for the arbitrator (R. 104). The chief reason is based upon this Court's decisions in the *Steelworkers* case that the bargain of the parties for a determination by the Arbitrator of the issues between them should be executed. Also emphasized by the Court of Appeals is the spirit of the arbitration processes and the delays that would ensue if the Court were to pass on these questions.

The Court of Appeals also felt that it was possible for the Arbitrator to find that there was substantial compliance by the Union. While the Petitioner still disagrees with this conclusion, this is a matter which it bargained for and should be interpreted by the Arbitrator.

Wiley's plea that it changed its position because the Union failed to invoke arbitration procedures is not borne out by anything in the record. As early as June 27, 1961, the Company was advised as to the Union's position and any acts of the Petitioner thereafter were at its own risk (R. 57, 68).

Some cases, in addition to those cited by the Petitioner (Pet. Br. 53) holding that procedural matters are for the arbitrator are: *Local Union No. 46, International Union of the United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America* v. *Bevington & Basile Wholesalers, Inc.*, 213 F. Supp. 437 (W. D. Mo. W. D. 1963); *Carey* v. *General Electric Co.*, 315 F. 2d 499 (2d Cir. 1963); *I. U. E.* v. *Westinghouse Electric Corp.*, 218 F. Supp. 82 (S. D. N. Y. 1963); *Larsen* v. *American Airlines, Inc.*, 313 F. 2d 599 (2nd Cir. 1963).

Because of Petitioner's request that the Court direct affirmance of the District Court's decision (R. 57), it may be appropriate to discuss the merits of the District Court's decision that arbitration was barred because of failure to comply with the grievance machinery.

The decision of the District Court is based upon the alleged failure of the Union to comply with the grievance machinery steps as set forth in the contract. The District Court refused to find any estoppel on the part of the Petitioner or any waiver by it of the grievance machinery steps.

To insist upon strict compliance with the grievance machinery procedures as set forth in the contract would defeat the intention of the parties, exalt form over substance, and perpetrate a gross injustice on the Union and the employees. After all, it was the Company which initiated the conferences at the level of the attorneys, and it was the Company which carried on these negotiations through its counsel and Vice President and Treasurer, Mr. Lobdell (R. 58, 62).

The facts show that throughout the negotiations, which consisted of more than six meetings with its counsel present—the issues were thoroughly and exhaustively gone into. Hence it must be, as a matter of fairness and equity, that the Company is estopped from raising the alleged non-compliance with the grievance machinery clauses in the contract.

The entire attitude of the Company, throughout the lengthy discussions which ensued, unwaveringly and adamantly adhered to by its counsel, shows that it would have been utterly futile—and a little bit ridiculous to follow the grievance steps as set forth in the contract. After all, contracts are entered into to carry out the intention of the parties, and as Judge Learned Hand commented, with respect to a statute—the surest way to misread a statute is to read it literally.

The Company's affidavits tell us that throughout the negotiations the Company insisted upon a single position—namely that there was no contract and that there was no Union (R. 58). Now it asserts that the "no-union" should have complied with the "no-contract." In fact, the Company would not even consider sitting down to discuss the problems without first stating that the discussions were not to be deemed a recognition of the Union or a recognition of the contract. The Company cannot have it both ways.

Fortunately, the cases support the views of the Union.

We start out at the outset with the leading case in the Court of Appeals in the State of New York, *River Brand Rice Mills* v. *Latrobe Brewing Company*, 305 N. Y. 36, 110 N. E. 2d 545 (1953), where the Court said (at p. 41):

> "It may be that, upon a proper showing, the portion of the agreement containing the time limitation: 'Any demand for arbitration must be made within five days after tender', would be held to be so am-

biguous or so unreasonably harsh, when applied to facts such as those presented here as to be unenforceable."

See also: *Matter of Tuttman*, 274 App. Div. 395 (1st Dept. 1948); *Matter of Raphael*, 274 App. Div. 625 (1st Dept. 1949); *Barr & Co.* v. *Municipal Housing Authority*, 86 N. Y. S. 2d 765 (West. Co. 1949), aff'd 276 App. Div. 981 (2nd Dept. 1950); *W. S. Ponton, Inc.* (Spec. 1, N. Y. Co. 1950), 101 N. Y. S. 2d 609, aff'd 102 N. Y. S. 2d 445 (1st Dept. 1951); *Application of Roselle Fabrics, Inc.*, 108 N. Y. S. 2d 921 (Spec. 1, N. Y. Co. 1951), aff'd 113 N. Y. S. 2d 280 (1st Dept. 1952).

In *Teschner* v. *Livingston*, 285 App. Div. 435 (1st Dept. 1955), aff'd 309 N. Y. 972, 132 N, E. 2d 333 (1956), the court said:

"The clause relied on for the claim that the demand for arbitration was untimely does not appear to have been intended for a situation such as that here presented, *especially since the movant could not have been prejudiced in the slightest by the short delay* * * *. Literal compliance would obviously be impossible,* * *." (Emphasis supplied.)

See also: *Local Union 516* v. *Bell Aircraft Corp.*, 283 App. Div. 180, 127 N. Y. S. 2d 166 (4th Dept. 1954).

In *Insurance Agents* v. *Prudential Ins. Co.*, 122 F. Supp. 869 (E. D. Pa. 1954), the company also contended that the failure of the union to give a certain notice barred the action by the union to compel arbitration. The Court said:

"The issue here does not involve the validity of the contract per se as its existence and the basic substantive arbitrable dispute revolving around the hir-

ing and firing of Merchant are admitted, nor can it be disputed that such basic substantive dispute is arbitrable under Article XXV. Thus, this is an action brought under a Federal statute and involves the matter of compliance with grievance and arbitration clauses of a valid contract. The dispute here unquestionably, involves substantive rights of the parties which are arbitrable. However, while plaintiff, on the one hand, insists that it complied with the time requirements of Article XXIV, defendant, on the other hand, insists that plaintiff's notice of dissatisfaction was two days late, an obviously procedural complaint."

The Court then went on to quote with approval from a Pennsylvania Supreme Court decision as follows:

"* * * 'The grievance, however, is one contemplated by the agreement between the parties and therefore it is for the arbitrator to determine not only the substantive rights of the parties, but compliance with the proper procedural steps as well, since the procedure is also fixed by the agreement and there is a dispute over the interpretation of the agreement in that respect.'"

In *Greenstone* v. *Amusement Clerks*, 8 Misc. 2d 1045, 166 N. Y. S. 2d 858 (Spec. I, N. Y. Co. 1957), the court overruled a motion of the company to stay arbitration where the company complained that the union had not exhausted a grievance procedure. The court held:

"The position she now urges that there should have been a request by respondent for negotiation is clearly sham and raised for no other purpose than to try to prevent the respondent from enforcing its right under the contract. Had there been a true desire to

negotiate, the petitioner could have availed herself of the arbitration provisions in the collective bargaining agreement and could have requested the respondent to select a representative to negotiate.

"To permit the petitioner, at this late stage, to delay and hamper arbitration by requiring the representatives of the parties to meet in an attempt to resolve the disputes between the parties would defeat the very purpose of the arbitration clause in the agreement. This court will not require any party to a contract to make useless and idle gestures in fulfillment of the terms of the contract when the conduct of one of the parties clearly indicates neither an intention of compliance with the contract nor even recognition of being bound by the contract itself." 8 Misc. 2d at 1047, 166 N. Y. S. 2d at 860-1.

In *Arsenault* v. *General Electric Co.*, 21 Conn. Sup. 98, 145 A. 2d 137 (1958), rearg. denied, 147 Conn. 130, 157 A. 2d 918 (1960), cert. denied 364 U. S. 815 (1960), the company objected to arbitration on the ground, *inter alia*, of the failure by the plaintiffs, discharged employees, to comply with the three steps set forth in the grievance procedure. The Court referred to the fact that at an early meeting the company had told employees that their discharges would stand and that it would be useless for them to proceed with arbitration because the company's position was "final" and not subject to change. The Court said that employees were entitled to take the company at its word and thus its present position, that the employees had failed to go on with the grievance procedure, was completely defective.

Roto Supply Sales Co. v. *District 65, RWDSU, AFL-CIO*, 32 CCH Lab. Cas. ¶ 70,796; 137 N. Y. L. J., p. 11 (Spec. I, Queens Co. 1957), (no official report), involved an arbitration by this Union on a discharge of an employee under a

contract similar to the one at bar. The Court ruled to similar effect when it held:

> "* * * it would have been futile and respondent could not be expected to do a futile act."

when the circumstances showed that the Company did not intend to do anything about the discharges.

See also: *In re Taurone Label Company, Inc.*, 39 CCH Lab. Cas. ¶ 66,390; 143 N. Y. L. J., p. 12 (Spec. 1, N. Y. Co. 1960) (no official report).

In *Livingston* v. *Tel-Ant Electronic Co.*, 4 Misc. 2d 600, 138 N. Y. S. 2d 111 (Spec. 1, N. Y. Co., 1955), rearg. den'd, 4 Misc. 2d 606, 138 N. Y. S. 2d 111, the Court said:

> "* * * It would seem quite obvious that the preliminary steps of adjustment procedure here provided for are inappropriate or impossible in a situation of this kind. In fact, the arbitration machinery was not, and perhaps should not have been, fully invoked in this situation—for it does not appear that the shop steward could possibly have any interest or duty in the matter. It may be, therefore, that, in the light of the language used in this clause, the indicated need of speed is not present in a dispute of this kind, but, rather, in those situations involving the interests of employees directly as they affect their working conditions." (4 Misc. 2d 604)

See: *Cement Workers* v. *Allentown-Portland Cement Co.*, 163 F. Supp. 816 (E. D. Pa. 1958).

Many arbitration cases hold that where it appears that it would be fruitless to follow grievance clauses, the other party would not be allowed to raise this point as a bar to

going ahead with the arbitration proceedings. In *Evert Container Corp.*, 30 L. A. 667 (1958), a State Board of Arbitration held that the arbitration was to proceed notwithstanding alleged failure to comply with some of the grievance steps, because, it was held, this was a top level decision and discussions at a lower level would be useless.

In *Pocketbook Workers Union* v. *Centra Leather Goods Corp.*, 14 Misc. 2d 268, 149 N. Y. S. 2d 56 (Spec. 1, N. Y. Co., 1956) the Court likewise overlooked an alleged failure to adhere to the grievance machinery because it considered that:

> "Obviously this objection lacks substance. Upon the question here involved discussion on the level suggested would be less than a formality. The contract must be read with that in mind and the obvious construction is that it does not require what would be useless."

In *Barbet Mills, Inc.*, 16 L. A. 563 (1951), the arbitrator overruled a similar contention made by the Company in that case, saying at page 565:

> "Nevertheless, the adamant refusal by Superintendent Long to consider reinstatement of Swing must be deemed to have vitiated the effect of any irregularity by the Union in failing to discuss Swing's discharge with the overseer. It would obviously have been a futile thing for the Union to take the grievance back to Beck after Long had stated flatly that he would not reinstate Swing unless he was forced to do so. And Long concedes that he did not retract from his stated position in this respect at any time prior to the arbitration, even when he offered to produce the Company's evidence for the Union."

In *General Baking Co.*, 28 L. A. 621 (1957) (no official report), the arbitrator overruled a similar objection, saying at page 622,

> "It does not appear that there is sound basis for the Company raising this technicality at this point as a basis for objecting to the arbitrability of the matter at hand. This opinion is substantially strengthened by the fact that, admittedly, it was the Company who initiated this matter directly with the business agent, and there is no evidence that the Company raised any procedural question when the business agent without any committee of stewards proceeded to process this matter as a grievance through discussion with the Company and through the mediation procedure of the Board."

See also, *Denver Post*, 41 L. A. 200 (1963).

There is still another line of cases which hold that where the violations are continuing, the time limitations in the contract do not control.

Thus, in *Grayson Controls*, 37 L. A. 1044 (1961), (no official report), a Board of Arbitration held, at page 1046:

> "I believe that it is essential to distinguish between what Arbitrator Seward has called 'claims which arise from single isolated events and those which are based upon a continuing course of action.' As he stated, 'it would be one thing to hold that where a transaction has been completed a failure to process a claim concerning that transaction within the contractual time limits properly bars its later consideration. It would be quite another thing to hold that when the Company has undertaken a permanent and continuing course of conduct alleged to be in violation of the Agreement a failure to process a grievance * * * would be a bar to all future efforts to have that

course of conduct corrected.' Bethlehem Steel Co., 20 LA 87, 91-92 (1953)."

In *Suttin* v. *Unity Button Works, Inc.*, 144 Misc. 784, 258 N. Y. S. 863 (N. Y. Co. 1932), it was stated at page 786:

"* * * Under these circumstances, it is evident that the injury is not only continuous, but irreparable, for not only do the members of the union lose the opportunity to labor for profit, but the union loses in prestige and trade unionism in attractiveness, an injury incapable of compensation. * * *"

The proposition of a continuing violation is not novel in the field of labor relations law. The National Labor Relations Board, in interpreting its six-month Statute of Limitations within which to file unfair labor practice charges, has often had occasion to consider this question. It has consistently held that where the violation is a continuing one, the six-month staute keeps on running.

Thus, in *NLRB* v. *Epstein, et al.*, 203 F. 2d 482 (3rd Cir. 1953), the Court upheld the filing of a charge after the six-month period, saying at page 485:

"* * * for the original charge was of a continuing violation and the subsequent acts were of the same class and were continuations of it and in pursuance of the name objects."

In *NLRB* v. *Gaynor News Co., Inc.*, 197 F. 2d 719 (2nd Cir. 1952), the Court similarly held with respect to certain illegal conduct, saying, at page 722:

"* * * we agree that, so long as that contract continued in force, if actually illegal, a continuing offense was being committed by the employer."

See also: *NLRB* v. *Leland-Gifford Co.*, 200 F. 2d 620 (1st Cir. 1952).

In *NLRB* v. *Harris, et al.*, 200 F. 2d 656 (5th Cir. 1953), the Court held that since the "* * * charge was of a continuing violation * * *" the Board had jurisdiction to consider violations subsequent to the filing of the charge.

In *Proctor & Gamble Independent Union, etc.* v. *Proctor & Gamble Mfg. Co.*, 298 F. 2d 644 (2d Cir. 1962), "a number of technical and unsubstantial objections," Circuit Judge Medina held, were "properly brushed aside in the Court below." So, in our case at bar, this Court should brush aside the number of "technical and unsubstantial objections" interposed by the Company. Judge Medina properly relied upon the *Steelworkers* decision, *supra*, and held that arbitration should proceed, by saying, at pages 645-6:

> "The nub of the matter is that under the broad and comprehensive standard labor arbitration clauses every grievance is arbitrable, unless the provisions of the collective bargaining agreement concerning grievances and arbitration contain some clear and unambiguous clause of exclusion, or there is some other term of the agreement that indicates beyond peradventure of doubt that a grievance concerning a particular matter is not intended to be covered by the grievance and arbitration procedure set forth in the agreement * * *."

This Court has during its last Term clearly indicated that it would cast aside a transparent contention that the magic label "arbitration" was necessary to bring a grievance determination within the *Steelworkers* doctrine. *General Drivers* v. *Riss & Company*, 371 U. S. 810 (1963). The same result should be ordered in this case.

The entire conduct of the Company throughout shows a waiver (R. 69, 105). The grievance machinery was intended to apply to only a small grievance affecting a single employee

and not to one affecting the entire bargaining unit (R. 69, 105).

Before the Court of Appeals, the Union took the position that the question here involved was a dispute or difference under the contract and that it would be absurd to require, under the cases, that this was a "grievance" which has to be filed with the employer and a Union shop steward (R. 105). In any event, the Union's letter of June 27, 1961 followed closely on the heels of the first notice received by the Union of the announcement of the merger (R. 57, 75, 105).

This case was unanimously decided below by Judges Medina, Smith and Kaufman. By the request for a hearing *en banc* all the judges of the Court of Appeals for the Second Circuit were involved and no active Circuit Judge requested that the case be heard *en banc*. Surely, this should be conclusive that the suit for arbitration, and the issues herein are not frivolous. Even if they were, unless the *Steelworkers* cases are to be reversed, arbitration must be directed.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Dated: October , 1963.

Respectfully submitted,

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